No. 21,509

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MUTUAL INDUSTRIES, INC.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF OF RESPONDENT MUTUAL INDUSTRIES, INC.

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Statement of Case.

This matter comes before this Court by way of petition filed by the National Labor Relations Board, hereinafter called Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et. seq.*) said petition seeks enforcement of an Order of the Board, which Order was issued on June 21, 1966, and which adopts, in almost every respect, the "Trial Examiner's findings, conclusions and recommendations" [R. 36].[1]

[1]References to the pleadings, the decisions and orders of the Board, and other papers, reproduced as "Volume I, Pleadings" are designated R. Reference to the stenographic transcript of the record reproduced pursuant to Rules 10 and 17 are designated "Tr."

The Board originally brought the action based upon a charge by the Los Angeles Dress and Sportswear Joint Board, International Ladies' Garment Workers Union, AFL-CIO, hereinafter called Union, against Mutual Industries Inc., respondent herein, hereinafter called Company.

In essence, the Board issued a bargaining order after finding that (1) a majority of the employees of the Company had signed authorization cards intending to designate the Union as their bargaining agent; (2) that after request, the Company refused to bargain although the Company had previously signed a recognition agreement and (3) that the Company promised the employees a health insurance plan to discourage them from joining or adhering to the Union and that because of the foregoing the Company violated Section 8(a)(1) and 8(a)(5) of the act.

At no time was there every any finding of Union animous on the part of the Company. The evidence indicated that the Company suggested an election on several occasions; that the Company never refused to permit the Union organizers to come on to the Company premises to organize, and even permitted the employees of the Company to translate for the Union organizers [Tr. 250, lines 5 *et seq.*] and that the Company never made speeches, distributed pamphlets, spoke to employees or used any of the other devices usually employed by management in situations such as this.

Statement of Issues.

Respondent's position is that at least eight (8) of the Company's fourteen (14) employees did *not* sign authorization cards intending to designate the Union as their bargaining agent; that the Company never signed a recognition agreement; that it never bargained with the Union; that its refusal to bargain was based upon a good faith doubt as to the Union's majority; that it never committed an independent unfair labor act as required to prove lack of good faith; that it was at all times ready and willing to consent to an election and that it communicated such readiness and willingness to the Union and that, in any event, since there was no Union animous on the part of the Company and since the Company was spectacularly cooperative with the Union, a bargaining order should not have been issued—at most, if anything, an election should have been ordered.

The main issue in this matter is whether or not a majority of the employees of the Company, as of April 13, 1965 (the key date), signed authorization cards for the purpose of authorizing the Union to act as their bargaining agent. There are other issues in this matter such as: (a) Did the Company sign a recognition agreement? (b) Was the Company's refusal to bargain based upon a good faith doubt as to the Union's majority status? (c) Did the Company offer the employees an insurance program to discourage Union membership? and (d) Whether or not this is a proper situation for a Bargaining Order or should an election

have been ordered? Such other issues shall be considered in detail in this brief, however, it is quite clear that if the Union had not obtained signed cards for the majority of the employees, all other contentions of the Petitioner must fail. This must follow since an Order ordering the Company to bargain with a Union which does not represent a majority of the employees would violate the most basic premises of the law to the effect that a Union may represent employees only if a majority of said employees desire such representation. Section 7 of the National Labor Relations Act, hereinafter called Act, guarantees to employees the "right to self organization", the "right to bargain collectively through representatives of their own choosing" and "to refrain from any activities whatsoever". "In order to establish an unlawful refusal to bargain on the part of the employees, it is necessary to establish that the representative seeking to bargain has majority status—*that it was designated by a majority of the employees in the appropriate unit . . .*" emphasis added (Labor Law Guide, Paragraph 2413).

I.

A. The Board Erred in Finding That Eight of Respondent's Fourteen Employees Signed Authorization Cards Intending to Appoint the Union as Their Bargaining Agent. At Best Only Six of the Company's Employees Signed Cards With Such Intention and of That Six Only Three Testified.

The Trial Examiner found: . . . "when Spindler (Union organizer) presented to Meyers (Company employee) the Recognition Agreement, the respondent employed fourteen production and maintenance employees.

Of these, nine had signed cards authorizing the Union to act as its bargaining representative" [R. 23, lines 41-44]. "That on April 13, 1965, the Union had been designated by nine of the fourteen employees in the appropriate bargaining unit . . ." [R. 25, lines 6-8].[2]

As to one of the employees, Rose Kardaschian, whom the Trial Examiner decided had signed an authorization card intending to designate the Union as her bargaining agent the Board held as follows: "We do not pass on the Trial Examiner's conclusion with regard to Kardaschian's card . . ." [R. 36, note 1]. Thus the Board found that of the fourteen employees, although nine signed authorization cards, only eight intended to designate the Union as their bargaining agent. As will be shown hereinafter of those eight, two testified that they signed the cards based upon specific misrepresentation of the Union (M. Elias and E. Elias), three employees did not testify and the remaining three employees who testified indicated that they actually intended the card to be an authorization for the Union to act as their bargaining agent. Thus we see that at the very most six employees signed cards intending to designate the Union as their bargaining agent—the three who signed cards and did not testify and the three who did testify that they intended the Union to be their bargaining agent.

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[2]R. 23, note 15 indicates that the employees who signed cards were M. Elias, Rodriquez, E. Elias, Jana Kardaschian, Hill, Bocage, Ustica and Thomas and that Benbow, Burga, Bushwar and Ross did not sign cards.

The following chart sets forth the names of the employees and their actions in regard to the authorization cards.

Employee's

1.	A. Benbow	— Did not sign authorization card
2.	I. Burga	" " " " "
3.	C. Bushwar	" " " " "
4.	R. Ross	" " " " "
5.	L. Marinez	— Signed card after April 12, 1965
6.	M. Elias	— Signed card based upon misrepresentation
7.	E. Elias	" " " " "
8.	R. Kardaschian	" " " " "
9.	H. Rodriguez	— Did not testify
10.	M. Hill	" " "
11.	S. Thomas	" " "
12.	T. Jana	— Signed card
13.	C. Bocage	" "
14.	A. Ustica	" "

14 employees
4 did not sign cards (Benbow, Burga, Bushwar and Ross)
1 signed card after key date (Marinez)
3 signed cards based upon misrepresentation (Kardaschian, M. Elias, E. Elias)
3 signed cards — did not testify (Rodriguez, Hill and Thomas)
3 signed cards to designate Union bargaining agent. (Jana, Bocage and Ustica)

B. Mario Elias Signed an Authorization Card, Not to Designate the Union as His Bargaining Agent, but Because He Was Told That the Union Needed His Signature to Speak to His Fellow Employees.

Mario Elias testified that when Spindler, Agent for the Union, requested that he sign an authorization card, Spindler told him that by signing the card Elias would be giving Spindler permission to speak to the other employees of the Respondent. In response to the questions of the attorney for the respondent, and the

questions of the Trial Examiner, Mario Elias testified as follows:

"Q. (Attorney for Mutual) Was Mr. Spindler there when you signed the card? A. Yes.

Q. Did you talk to him about signing the card? A. No. I went up there to tell him that I was giving a week's notice for Superior Bias Binding. Then he told me that he heard about the Mutual without no union and all that, and he gave me an authorization card, or whatever.

I, can't pronounce it, and he asked me to sign it for permission for him to go to the union. I signed it.

Q. Now, would you explain that to us a little more? He said for permission to go to the union? A. Yes, to give him more authority to go to the Mutual Industries.

Q. To talk to the employer? A. Employees.

Q. He was looking for authority to talk to the employers or the employees? A. Employees—no, employers.

Q. People like you, did he want to talk to? A. Yes.

Q. He wanted to talk to people like you? A. Right.

Q. So what he was asking—don't let this worry you. We can't speak your language, so don't let it worry you. Is this a correct statement: He told you that if you signed this card this would give him permission to talk to the other workers in the plant? A. Yes, something like that." [Tr. 97, lines 1-25].

"Trial Examiner: Let's clear this up.

Mr. Elias, did he say that the purpose of signing the card was to give him authority to talk to the bosses?

The Witness: No, to the workers.

Trial Examiner: Just the workers?

The Witness: Yes, to go in there—in other words, you know he couldn't go in—he told me that he couldn't go in there without permission that the workers wanted to see him. Something like that." [Tr. 98, lines 5-14].

"Trial Examiner: Now, when Mr. Spindler gave you this card to sign, did he tell you why it was necessary for you to sign it in order that he, Mr. Spindler, could go in to talk to the workers?

The Witness: Yes. Well, he said to have it signed so he could have more authority to go into the shop and talk to the workers there to join the union." [Tr. 104, lines 5-12].

"Trial Examiner: Thank you, Mr. Elias. You are excused. Just a moment, I think perhaps I want to ask you a question or two.

When Mr. Spindler asked you to sign the card —blue card that was shown to you, which was marked 'Authorization,' did he tell you why it was necessary for you to sign a card so he could talk to the other workers? Did he tell you anything like that?

The Witness: Make that Statement again.

Trial Examiner: If you don't understand me, you say so. I am going back to the time when he gave you that blue card which is identified as—what is the exhibit number?

Mr. Kreger: GC 3(i), Mr. Examiner.

Trial Examiner: General Counsel's Exhibit 3 (i). Do you see this card?

The Witness: Yes.

Trial Examiner: One that you signed?

The Witness: Yes.

Trial Examiner: Now, when Mr. Spindler gave you this card to sign, did he tell you why it was necessary for you to sign it in order that he, Mr. Spindler, could go in to talk to the workers?

The Witness: Yes. Well, he said to have it signed so he could have more authority to go into the shop and talk to the workers there to join the union.

Trial Examiner: Did he tell you why your signing the card would give him more authority to talk to the workers?

The Witness: That is what he said to me. Now, I read—I didn't sign it thinking—

Trial Examiner: I am not asking you what you were thinking. I am just asking what was said. Understand?

The Witness: Yes.

Trial Examiner: Did you read this card?

The Witness: I didn't even bother to read it.

Trial Examiner: Do you read English?

The Witness: Yes, I do.

Trial Examiner: Do you read Spanish?

The Witness: A little bit.

Trial Examiner: You read English, though?

The Witness: Yes.

Trial Examiner: You didn't read the card, though, did you?

The Witness: Not all of it.

Trial Examiner: What part did you read?

The Witness: 'Authorization Card,' right there.

Trial Examiner: That is all you read?

The Witness: Yes. I just took his word for it, I guess, for him to go over to the union.

Trial Examiner: Well, he didn't go over to the Union. He was in the union.

The Witness: I mean to go to Mutual Industries for Jack Spindler.

Trial Examiner: Did he say that he wanted to talk to Mutual Industries about anything?

The Witness: Well, he wanted to go in Mutual Industries Shop to talk to the workers there, and get cards signed like that.

Trial Examiner: I see.

O.K., I have no further questions, unless my questions have stimulated some?" [Tr. 103, 104, 105].

In spite of this *uncontradicted* testimony by an *employee,* the Trial Examiner finds that ". . . it is unrealistic to believe that Spindler told him (Elias) that he (Spindler) needed authorization cards in order to talk to the employees." [R. 24, lines 33 *et seq.*] What other testimony could be offered? What better testimony could be offered? Mr. Elias had no motive for distorting the truth. This cannot be said of all the other witnesses. Mr. Elias was, as the Trial Examiner points out, a Union member. His sympathies were obviously with the Union. Why is it unrealistic to believe that Spindler told Elias an untruth?

The Trial Examiner indicated that because Elias was a Union member when he signed the card and was once a committeeman for the Union and because he read *one*

word of the card—not the whole card—just one word on it, that it is unrealistic to believe, etc. [R. 24, lines 25 *et seq.*]. Mario Elias is not a grammarian. For a similar situation where the employee's ability to understand an authorization card is considered see (*N.L.R.B. v. Miller,* 341 F. 2d 870).

The Trial Examiner observes that Mr. Elias was familiar with the function of the union. In regard to that fact, Mr. Elias testified in response to questions propounded by the Counsel for the General Counsel as follows:

> "Q. Did you ever hold a union position while you had been a union member, like committeeman, or anything like that? A. Yes, It was a small deal. It didn't last no more than two or three weeks, or something like that." [Tr. 99, lines 5-8].

The Trial Examiner also seems to indicate that Mr. Elias understood the function of a business agent. This is obviously not so as Mr. Elias' testimony indicates.

> "Q. (By Mr. Feinberg). Mr. Elias, while you were a member of the union, what did you believe Mr. Spindler's duties to be? A. Well he was our agent at the union. That is about all.
>
> Q. Well, what was he supposed to do? A. Go over there and see us, how we are doing, he used to tell us—advise us what to do and what not to do.
>
> Q. Did you ever hear him talk on behalf of a worker to the employer? A. I don't understand that." [Tr. 107-108, lines 24 *et seq.*].

Mr. Elias did not know union people spoke to management. He thought union representatives only spoke to employees.

It is clear that Mr. Elias was told, and he believed, that he was signing the card so that Spindler could speak to the other employees. He did not intend to designate the union as his bargaining agent.

As is said by District Judge Timbers in his concurring and dissenting opinion in the case of *N.L.R.B. v. Gotham Shoe,* 359 F. 2d 684, at page 698.

> ". . . largely unfamiliar with NLRB procedure, they (employees) could hardly be expected to know, for example, that if enough of them signed cards 'to get an election' or 'to get a vote' . . . there very well might not be an election or a vote."

C. Eloy Elias Signed the Authorization Card Not to Designate the Union as His Bargaining Agent but Because He Was Told That the Reason for the Card Was That the Union Wanted to know the Number of Respondent's Employees.

The Trial Examiner found that Eloy Elias signed an authorization card for the purpose of designating the Union as his bargaining agent [R. 24, lines 53-55], despite the testimony of the employee which indicates that Mr. Spindler was once again guilty of misrepresentation. The pertinent section of Mr. Elias' testimony reads as follows:

> "Q. (By Mr. Benjamin) Did he say anything else to you as to what it meant? Did he tell you? A. Yes, he read it to me.
>
> He says, 'This card doesn't mean anything. We just like to know how many people are going to

be in the shop, so we could form a union.' That is all he said, and I signed it." [Tr. 114, lines 11-17].

"Trial Examiner: The other gentlemen that is not here. Did he say as to what it didn't mean anything?

The Witness: He said, 'This card doesn't mean anything. We just like to know how many people are going to be in here so we can keep other names, and we will establish a union—see if we can get a union.'

Trial Examiner: Did he say where he wanted you to sign the card?

The Witness: Just like I said. That is the way he told me. Just like to know how many people have in the shop, so we can form a union." [Tr. 115-116, lines 16 *et seq.*].

What other or better evidence could have been adduced? What other or better witness could have so testified? Eloy Elias, an employee, a union member, testified that he was told that the union wanted his signature to determine the number of employees in the shop. That testimony is *unrefuted* and *uncontradicted,* and the Trial Examiner finds that his testimony should not be credited. Respondent respectfully suggests that the decision of the Trial Examiner is not based on "substantial evidence".

D. The Board Erred in Finding as a Matter of Law, That Even if an Employee Signs an Authorization Card Based Solely on a Misrepresentation That Such Card Is Valid Unless the Employee Is Told That Such Misrepresentation Is the Sole Reason for the Card. The Rule Is That a Card Obtained by a Lack of Candor May Be Valid but a Card Obtained by a Misrepresentation Is Not Valid.

The Trial Examiner held as follows in respect to the authorization cards of Mario Elias and Eloy Elias:

> ". . . In any event assuming *arguendo* that Elias was testifying correctly as to what Spindler told him, it is apparent that Spindler did not tell him (Mario Elias) that this was the sole purpose of the card. Absent such limiting representation it is well settled that the card was a valid authorization."
>
> "The foregoing principals apply with equal force to the authorization card signed by E. Elias." [Tr. 8, lines 36-46.]

The cases cited by the Trial Examiner in support of that statement stand for the proposition that where an authorization card is signed based on the statement of the Union Agent that the *sole* purpose of the card is to obtain an election, the card is invalid, but where the fraud consists of telling the employee that *one* of the purposes of the card is to obtain an election, the card is valid. The rule, although much criticized and much reviled, does seem to state the current law (*N.L.R.B. v. Gotham Shoe Manufacturing Company*, 359 F. 2d 684 (C.A. 2).)

The rationale of that rule is that when an employee is told that *one* purpose of the card is to get an election, he has *not* been told a lie. To get an election *may* be one of the reasons for having a card signed. But when a Union representative tells the employee that the *sole* reason for the card is to obtain an election, he has told a lie—the Union can use the card for other purposes.

In the dissenting opinion of the District Judge Timbers in *N.L.R.B. v. Gothan Shoe, supra,*

> "To refrain from affirmative deception is not enough: the responsibility of furnishing specific relevant information to enable employees who are solicited to make an informed decision should be squarely on the Union and the burden of validating Union representation cards should be commensurate with that responsibility".

In the instant situation, the cards were signed on the basis of out and out misrepresentations. Does the Board advance the rule that a Union Agent may go to any length to deceive the employee so long as he does not affirmatively tell him that the sole purpose of the card is to obtain an election? Certainly not. As is said by Judge Learned Hand in (*N.L.R.B. v. Dadourian Export Corp.,* 138 F. 2d 891 (892)) "Fraud vitiates consent as well as violence . . ."

The rule is that the Union must at least refrain from outright and affirmative fraud, and that cards based on such outright and affirmative fraud are invalid. In this case, neither of the Elias' were told, nor did they know, that the purpose of the cards was to authorize the Union to represent them—they were told, and they believed, specific misstatements of fact.

The cards were signed based on the fraud of a Union representative and by signing the card, the employees have not "clearly manifested an intention to designate the union as the bargaining representative" and should be held invalid for that purpose.

E. One Illiterate Employee (Rose Kardaschian), Who Had No Conversation About the Card, Signed a Card Which Was Solicited by Her Foreman — Without Understanding It and Without Intending It to Constitute a Union Designation.

Another employee who signed an authorization card was Rose Kardaschian, about whom the Board refused to make a decision. Employee Kardaschian spoke only Russian and testified through an interpreter as follows:

> "Q. (By Mr. Benjamin) Did you speak to anyone at the time you signed the card about the card? A. There was no conversation whatsoever. He gave me the card. I signed it, and that was all" [Tr. 196, lines 6-9].
>
> "A. She did assist me in filling this out. However, the foreman (Tony Elias) on previous occasions have often given me cards and not explained what they meant. I just continued to sign them and give them back to him." [Tr. 196, lines 21, to 24].
>
> "Q. Did you also tell him that the Union man—I withdraw the question. What did you do with the union card after you signed it? A. I gave it back.
>
> Q. To whom? A. I gave it to Tony, (foreman) and he forwarded it.

Q. You gave it to Tony?" [Tr. 194, lines 16-22].

"Q. You gave it to Tony, or to the union man? A. I gave it to Tony." [Tr. 195, lines 2 and 3].

It is clear from the testimony of the witness that she (1) was never told what she was signing; (2) could not read the card she signed; (3) is unclear as to whom gave the card to her; (4) returned the card to the foreman; (5) signed the card because she often signed cards her foreman gave her, not for any specific reason.

The case of *Hecks, Inc.*, 156 N.L.R.B. 760 provided that the participation of a foreman in the solicitation or organizational efforts of a Union may taint the entire card showing.

Trial Examiner, Maller, held as follows:

> "Hecks, Inc. does not support respondent's position as she was not solicited by the foreman. To the contrary Spindler (Union Agent) testified creditably that he obtained Kardaschian's signature". [R. 24, lines 65 *et seq.*]

Respondent respectfully observes that Mr. Spindler did not testify that he "obtained" Mrs. Kardaschian's signature on General Counsels 3(J). He only testified that he was present when the card was signed. [Tr. 39, lines 19 *et seq.*] There is no evidence as to who obtained Mrs. Kardaschian's signature. The only evidence we have is the fact that her foreman often gave her cards to sign which she did not understand. However, we are quite clear as to whom she returned the card. She returned the card to her foreman. She believed she was signing the card for her foreman. The theory of the

Heck case cannot be disregarded. It is specifically applicable in this situation.

The Trial Examiner says that "in any event . . .", which must mean that even if the foreman did participate in the solicitation of the signature, ". . . there is nothing in her testimony which would overcome the presumption of validity flowing from the authorization which appears on the face of the card." [Tr. 9, lines 1-5]. It is submitted that all of the employee Kardaschian's testimony serves to overcome the presumption of validity.

The Board did not take a position as to Kardaschian's card [R. 36, note 1].

F. Three Employees Who Allegedly Signed Cards Did Not Testify and Therefore Their Cards Should Not Be Counted.

Employees Rodriguez, Hill and Thomas did not testify. Since the representatives of the Union made serious misrepresentations to employees and since the foreman solicited the signature of another employee and since many of the employees of Respondent did not speak English, it is only fair to assume that the Union used similar faulty methods to obtain the signatures of the three employees who did not testify.

It is well established law that the burden of proving that a majority of the employees have designated the union as their bargaining agent is on the General Counsel.

> "Where the General Counsel seeks to establish a violation of Section 8(a)(5) on the basis of a card showing he has the burden of proving . . . that a majority of employees in the appropriate union

signed cards designating the union . . ." *John P. Serpa,* 155 N.L.R.B. 99, 1965. Although this case was reversed and remanded in *Retail Clerks Union No. 1179 v. N.L.R.B.* (March 28, 1957—C.A. 9—No. 20,781) the court affirmed the fact that the General Counsel has the burden of proving not only a majority but also the employers bad faith.

In the case of (*N.L.R.B. v. Peterson Brothers, Inc.,* 342 F. 2d 221 at 224 (1965)) the court found that:

". . . there was a burden on the General Counsel to establish by a preponderance of the evidence that the signor of the card did, in fact, what he would have done by voting for the union in a board election."

In the *Peterson* case, this finding was based on the fact that the wording on the authorization card was ambiguous. In the instant situation, the General Counsel should bear the same burden—that is the burden of proving by a preponderance of evidence the subjective intent of the signor at the time of the signing—for the reason that there is substantial evidence indicating that several of the employees who signed cards could not read or speak English and that the Union's representatives not only failed to explain to them what they were signing but actually were guilty of direct and outright misrepresentations.

As is indicated in the Brief for the National Labor Relations Board, "The law is settled that authorization cards may be authenticated by a witness to the execution" (citing cases). However, there is more to that rule of law. It is also clear that there must be no

reason to preclude acceptance of the witnesses testimony. The witness must be trustworthy. In the case of *Economy Food Center, Inc.*, 333 F. 2d 468, 471 (C.A. 7) the Court indicated as follows:

> "The signatures on the cards of the two employees absent at the time of the hearing, were authenticated by Union representative Goss, who testified that both cards were signed in his presence and that he witnessed each signature. *In view of the fact that no reason appears in the record to preclude acceptance of Goss' testimony as determining the authenticity of the cards, we can not say that the finding of the Board was not justified.*" (Emphasis added).

In the instant situation there is much reason to preclude acceptance of the testimony of the witness as determining the authenticity of the cards. As has been seen by much of the foregoing, the testimony of the Union's witnesses has often been in direct conflict with the testimony of the employees. That is reason enough.

G. Conclusion.

From all of the above, we see that the Union did not have a "clear majority" by any means. Even if the three cards of the nontestifying witnesses are counted, there were still only six employees who signed cards intending to designate the Union as their bargaining agent. Those six consist of the three who did not testify (Rodriguez, Hill and Thomas) and Jana, Bocage and Ustica. In the instant situation a majority would require eight of the fourteen employees

to have signed an authorization card with the intention of designating the Union to act as their bargaining agent. Seven such cards would not be sufficient "A designation by 50% of employees is not sufficient. The Union must have a majority 'signed up'" *Martin Theatres of Georgia,* 126 N.L.R.B. No. 1054.

II.

The Board Erred in Finding That the Respondent's Refusal to Bargain Was Not Based Upon a Good Faith Doubt.

> "Ordinarily when faced with a Union's demand for recognition on the basis of signed authorization cards, an employer may lawfully insist on a Board election to establish the Union's majority status unless such insistence is a ruse to gain time. Whether the insistence on election is proper or improper depends on finding as to whether doubt is in good faith or not." (*Joy Silk Mills,* 185 F. 2d 732, 741; *Gem City Mattress,* 136 N.L.R.B. 1317).

It is not an unfair labor practice for an employer to refuse to bargain with a representative of his employees unless he knows that representative has been designated by a majority of his employees. Actual uncertainty as to the representative's majority status excuses the employer from bargaining. *France Foundry & Machine Co.* (1943), 49 N.L.R.B. 122.

It is a well established rule of law that the General Counsel has the burden of proving the employer did not have a "good faith" doubt as to majority status of

the Union (*John P. Serpa, supra*). Chariman McColloch citing the *Serpa* case in a speech reported in 60 B.N.A. L.R.R. 150 said:

> ". . . the Board as a matter of general practice dismisses charges against employers when the General Counsel fails affirmatively to prove that the refusal was not based upon a 'good faith' doubt of the Union's majority."

In the instant situation, Dave Meyers, the Los Angeles plant manager, testified that he did not believe the Union represented the majority of the employees either before April 13th or after April 13 or at the time of the hearing [Tr. 256, lines 17 *et seq.*]. He testified that he doubted the Union's majority status because of conversations he had with the plant foreman, Anthony (Tony) Elias, who informed him on many occasions that he did not think that employees wanted the Union. Their foreman, Anthony Elias, who was fired by Meyers in October, 1965 [R. Tr. p. 266, lines 12 and 13] testified that he told Meyers that ". . . there were several (employees) there that didn't want the Union." [Tr. 238, lines 16 *et seq.*]. Meyer testified that he told the Union representative a number of times that he doubted that the Union represented a majority of the employees and [Tr. 335, to 337, lines 18 *et seq.*] that he made that observation to Spindler both before and after April 12, 1965 [R. Tr. p. 336, lines 6 *et seq.*].

The Trial Examiner and the Board brushed all of the above testimony aside as "flimsy evidence" on which to base a good faith doubt as to the Union's majority [R. 26, lines 4-6].

Thus, we see that neither the Trial Examiner nor the Board attempted to ascertain whether respondent actually had a good faith doubt. They looked only at the question as to whether the respondent should have had a good faith doubt. The question is not—Did the Company have enough evidence to support a good faith doubt?—The question is—Did the Company actually have a good faith doubt?

As we have seen above, the General Counsel has the burden of proving that the refusal to bargain was not based upon a "good faith" doubt of the Union's majority. In the instant situation, the Board seems to have transferred the burden of proving the good faith doubt to the respondent.

A. There Can Be No Finding of Good Faith Doubt Without the Finding of an Independent Flagrant Unfair Labor Act.

It is clearly the law that there can be no "good faith doubt of majority" without the showing of an independent violation of the act. As said by member Howard Jenkins in *Aaron Bros.*, 158 N.L.R.B. 108.

> "Thus, the concept of "good-faith doubt of majority", whatever its relevance in other types of Section 8(a)(5) violations, has become irrelevant to the decision of cases of this type, where the employer rejects the card showing but engages in no violations of the Act, no undermining of the Union, no interference with the employees' freedom of choice, and does not otherwise exhibit bad faith."

As will be seen hereinafter, there was no independent unfair labor act committed by the Company.

The Board adopted the Trial Examiner's testimony that the Company offered the employees a medical plan to discourage the employees from joining the Union [R. 26, lines 59-62].

The only reason that this could be important is to indicate to the Board that the Company did not have a "good faith doubt" and to provide the reason for the issuance of a Bargaining Order.

It is well established that (1) there must be an independent unfair labor practice at the time of the refusal to bargain and (2) that independent violation must be flagrant, not "de minimis" and (3) have been made with the object in mind of destroying the Union's majority. *Hammond and Irving,* 154 N.L.R.B. 1071.

In that case, the employer questioned six employees out of 110 or 111 employees. The court held at page 1071 as follows:

> "While unfair labor practices committed on or about the time of an employer's refusal to bargain often demonstrates the bad faith of the respondent's position, *not every act of misconduct necessarily vitiates the respondent's good faith.* For there are situations in which the violations of the Act are not truly inconsistent with a good faith doubt that the Union represented a majority of the employees. Whether the conduct involved reflects on the good faith of the employer requires an evaluation of the facts of each case." (Emphasis added).

The reason, for the requirement of an independent flagrant unfair labor practice to indicate sufficient bad faith to issue a Bargaining Order, is that a Bargain-

ing Order is "strong medicine depriving both employer and employees of their rights" *N.L.R.B. v. Flomatic,* 59 LRRM 2539 and that unless an employer is engaging in activities which "have made a fair and free election impossible . . . (or which) . . . evidences a rejection of the collective bargaining principle . . ." (60 B.N.A. L.R.R. 150) such an order should not issue. The flagrant independent unfair labor practice is needed to prove that such a state of affairs exists. Mere refusal to bargain is not so heinous a crime to require a bargaining order.

Because of the above described state of the law, even assuming *arguendo* that it is found that on April 13, 1965, the Union represented a majority of the employees, there is still insufficient evidence to find a violation of Section 8(a)(5). Without the independent flagrant violation the General Counsel cannot sustain the burden of proving the lack of good faith. (*Aaron Bros., supra*).

B. The Board Erred in Adopting the Trial Examiner's Findings That the Company Committed an Independent Unfair Labor Act.

It thus becomes important to determine whether the finding that the Company committed an unfair labor act (offered a medical plan) is supported by the evidence and if it is proved that a medical plan was offered to the employees was it so reprehensible as to make a fair and free election impossible.

Of the fourteen employees of the Company as of April 13, 1965, only eight testified at the hearing. Of these eight only two were asked any questions in regard to the alleged offer of medical insurance. One of said employees was Mario Elias who testi-

fied that all that was done was the collection of statistics. He responded to a question as to his understanding as to who was going to pay for the insurance as follows: "A. Let me see. He didn't discuss nothing to us. All he wanted, some information about dependents, our names, and that was it." [Tr. 246, lines 9-11].

The other employee who was questioned as to a medical plan was A. Ustica. She testified that her foreman spoke to her in relation to a medical plan and testified that she understood that the employee was to pay the premiums [Tr. p. 232, lines 1-10].

Four other employees, *who were not employed as of April 13, 1965,* were called as witnesses. Of those four, one was not questioned as to the issue, one testified that only statistics were gathered, one testified that he was told the employee would pay for the insurance and one testified that she was not spoken to in reference to insurance.[3]

Of the twelve employee witnesses who appeared in this matter only one, Danny Estrada, who was hired after April 12, 1965, testified that the Company actually offered him anything. It is interesting that Danny Estrada is unquestionably the employee whose testimony was most clear in regard to his desire to be represented by the Union. It follows therefore that the only results that respondent achieved by their alleged unfair labor practice was to induce Mr. Estrada to "join the Union".

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[3]See chart Exhibit A.

All in all, of the twelve employees to testify, six were not questioned at all, as to a medical plan, an extremely revealing fact, one testified that no one ever discussed a medical plan with her, two testified that only statistics were gathered, two indicated that they were told that the employees were to pay for the plan and one testified that he was told that the employer would pay for the plan.

It is this one state of affairs which the Board relied on, in essence the testimony of only one of twelve testifying employees, to find that the Company made a "fair and free election impossible" and evidences a rejection of the bargain principal. This finding is very obviously without merit and not based upon a substantial portion of the evidence as required by the law as enunciated in the case of (*American Ship Building Company v. National Labor Relations Board*, 380 U.S. 300). The wrong, if any there was, was "de minimus".

It should also be noted that there is no evidence that the employer rejected the collective bargaining system. As a matter of fact, a Union organizer, testified that the attorney for the respondent requested that there be an election and indicated that "he would see to it that we had a fast election" [Tr. 163, lines 15 *et seq.*]. The Vice-President of the Company also testified that "(he) was willing to have an election, was willing last week, the month before and the month before." [Tr. 380, lines 1-5].

III.

A Bargaining Order Is "Strong Medicine" Based on a "Notoriously Unreliable Method of Determining Majority Status" Which Should Be Issued in Only the "Most Flagrant Situations" and Is Therefore Not Appropriate in the Instant Situation.

> "Now everyone knows . . . that honest and free elections are a better test of employee choice than authorization cards".

The above statement was made by Chairman McCulloch in his speech reported at 60 BNA LRR 150.

> The Board has held that authorization cards are a "notoriously unreliable method of determining majority status of a union . . ." (*Sunbeam Corp.*, 99 N.L.R.B. 546 at pp. 550 and 551).

Chairman McCulloch points out that although the authorization cards are unreliable they do have some purpose.

> "Where an employer's unfair practices or interference have made a fair and free election impossible, and where his conduct evidences either such a rejection of the collective bargaining principle or such an effort to undermine the union's majority as to show he had no good faith doubt about it, it is reasonable to go back to the cards to determine the choice of the majority."

It is obvious from the above that Chairman McCulloch believes that the only situation in which it is reasonable to "go back to the cards to determine the choice of the majority" is when the employer has been guilty

of some flagrant abuse of the law. Using this criteria there can be no question that in the instant situation the employees' choice should be tested by the better method namely secret elections rather than by a show of cards.

Here the employer is *not* one who has done everything in its power to undermine the Union or whose actions evidence a rejection of the collective bargaining principle. Here the Respondent has been spectacularly cooperative. The Union representatives have been allowed free access to the plant's premises and employees. No Union representative was ever denied permission to come on to the premises or to speak to an employee. As a matter of fact, Union representatives were permitted to use one employee to translate for another [Tr. 250, lines 5 *et seq.*]. The Respondent did not make speeches, distribute pamphlets nor use any of the tricks it had available to it, and Meyers testified that he never discussed the Union with any employee other than his foreman Anthony Elias [Tr. 281, lines 1 *et seq.*].

All of the above testimony is unrefuted. Respondent has always been ready to consent to an election so that the actual choice of the employees might be determined by a secret ballot.

However, the Union is not willing to permit the employees to make their decision by a secret ballot. It insists upon a bargaining order.

> "A bargaining order . . ., is strong medicine. While it is designated to deprive employers of a chance to profit from a stubborn refusal to abide by the law (Citing Cases) and although it undoubtedly operates to deter employers from adopt-

> ing illegally intrusive election tactics, its potentially adverse effect on employee's Section 7 rights must not be overlooked. (Citing Cases) That Section protects the rights of employees to join or refrain from joining a labor organization and that right is implemented by Section 9(c)(1) which provides for representation elections by secret ballot. Since a bargaining order dispenses with the necessity of a prior secret ballot there is the possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees." (*N.L.R.B. v. Flomatic,* 347 F. 2d 74 at page 78).

The basic concept which is evolving is that bargaining orders being "strong medicine" should be used with restraint (*N.L.R.B. v. Johnnies Poultry Company,* 344 F. 2d 617).

> "The argument for restraint seems even more compelling since the Board's decision in the Bermel Foam Products Co., Inc." (*N.L.R.B. v. Flomatic Corp., supra*).

One writer even goes so far as to advocate that a bargaining order should only issue in cases involving serious violations such as discriminatory discharges or clear threats of retaliation. *Bok, "The Regulation Of Company Tactics In Representation Elections Under The National Labor Relations Act, 78 Harvard Law Review 38 at p. 138 (1964)."*

In the instant situation there is no reason to substitute a bargaining order for a secret election. Absolutely no evidence has been adduced which would indicate that such a substitution is necessary.

IV.

The Board Erred in Finding That the Company Recognized the Union and Negotiated With It.

A. An Employer May Not Recognize a Union Which Does Not Represent a Majority of Its Employees.

The Board adopted the Trial Examiner's findings to the effect that the respondent signed the document, General Counsel's Exhibit 4, with the intention that it be considered a Recognition Agreement.

Assuming *arguendo* that the Company did sign a recognition agreement and did negotiate with the Union, it would still not suffice to permit a bargaining order to issue, since the Union did not have the majority of the employees.

An employer may not recognize a Union which does not represent a majority of its employees. (*Lively Photos,* 123 N.L.R.B. 1054; *Winn and Lovett,* 115 N.L.R.B. 1676); N.L.R.A. Section 8(a) (2).

The Board, in its opinion cites the (*Greyhound Terminal* case, 37 N.L.R.B. 87 enfd. 314 F. 2d 43) for the proposition that a refusal to bargain with a Union after recognizing and bargaining with it is a violation of Section 8(a)(5). The Greyhound facts are substantially different from the facts in the instant situation. In the *Greyhound* case there was no question that the Union had a majority of the employees. In the instant case it is quite clear that the Union did not have the majority of the employees.

The basic fact is that if the Union did not have a majority of the employees on April 13, 1965, even if the document [General Counsel's Ex. 4] was a recognition agreement and even if the Company did bargain

with the Union, it cannot be the basis for a bargaining order since that would be forcing a Union on employees who do not desire that Union.

On the other hand, even if the Union had a majority of the employees, the question as to whether or not the Company signed a recognition agreement or bargained with the Union will be important. It will go to the question as to whether the Company did or did not have a good faith doubt. It is the Company's position that it did neither.

B. The Respondent Did Not Recognize the Union as the Bargaining Agent for Its Employees.

It is agreed by all parties that the respondent's employee Meyers signed the document introduced into evidence as General Counsel's No. 4. However, it is respondent's position that in order for the document to be a binding recognition agreement it is necessary (1) that the Union have a majority of the employees and that (2) the document be signed by a properly authorized agent of the respondent with (3) knowledge of its meaning and (4) with an intent to recognize the Union.

Thus, assuming *arguendo* that the Union had a majority of the employees, the following two questions must both be answered in the affirmative before the document can constitute a recognition agreement:

(A). Did Meyers understand what he was signing? and

(B). Did Meyer have the authority to sign the document?

C. Meyers Signed the Alleged Recognition Agreement Based Upon Spindler's Misrepresentation.

As to the first question (Did Meyers understand what he was signing?) there is a conflict of testimony Spindler testified that he brought the document to Meyers at the plant; that Meyers read the contract and signed it; that there was not much conversation at the time and that he and Meyers were alone at the time of the signing [Tr. 36, lines 3 *et seq.*].

Meyers on the other hand indicated that he met with Spindler on the 12th or 13th of April, 1965; that the meeting was in Meyers' office and that a fellow employee, Norman Gross, was present [Tr. 258, lines 16 *et seq.*]. Meyers testified on direct questioning as follows:

> "Q. And what did you say to him—I mean, what did you say to Mr. Spindler, and what did he say to you? A. I was sitting at the desk, and Mr. Spindler came into the office. He handed me a piece of paper, and he asked me to sign it.
>
> I took the paper in my hand and glanced at it, looked at it, and asked Mr. Spindler what was this all about.
>
> He says, 'All it means, Dave, is that we are the first union to come in here.'
>
> I said, 'Are you sure this is all it means?' He says, 'Yes.'
>
> I said, 'In that case, I don't see any objection to signing it.'
>
> "Q. And did you sign it? A. Yes, sir." [R. Tr. 258, lines 16 *et seq.*].

Mr. Gross testified on direct questioning as to the situation as follows:

"Q. Would you tell us about your second meeting? A. I think that was in my office. Mr. Meyers and I were discussing some type of business, and Mr. Spindler came in. He had a form which he asked Mr. Meyers to sign.

Q. Could you tell us, if you remember, to the best of your recollection, the conversation? You know, what he said and what you said, if you can. If you can't, don't. A. Well, I don't remember very much. I know he had a form, and he gave it to Mr. Meyers to sign.

Mr. Meyers look it over. I think he asked Mr. Spindler what the form was.

Mr. Spindler said, 'It shows that we were the first union to contact you people.'

Mr. Meyers signed it, and he asked Mr. Spindler was that all it meant. That was pretty much the end of it.

"Q. Did Mr. Spindler leave at that time? A. Yes, as far as I know." [Tr. 350, lines 15 *et seq.*].

The question may well be asked at this point—why did Meyers sign a document which, when understood, is clearly a "recognition agreement" if he did not intend to recognize the Union. The answer is obvious. Meyers did not understand what the document meant. Meyers is not a lawyer, he has very little experience in labor matter [Tr. 327 and 328]. He is an ingenuous man who believed that which Spindler told him. He believed he was making a statement of fact, to wit, that

this particular Union was the Union that first attempted to organize the plant.

There can be no question that Meyers was careless. He should not have signed a document he did not understand. However, he signed it based upon Spindler's representation. It is very important to remember that if, a bargaining order is entered based upon Meyers' carelessness, the employees will be forced to join and pay dues to a union which was not selected by a majority of them and the employer will be forced to bargain with a union that does not represent a majority of its employees. Two of the major reasons underlying the National Labor Relations Act would, therefore, be ignored.

The law in matters of this nature is as follows:

> "If the fraud goes to the inception or the execution of the (document), so that (signor) is deceived as to the nature of his act . . . or does not intend to enter into a contract at all . . . (the document) is void." *Witkin's Summary of California Law,* Vol. 1, p. 150.
>
> "Where the failure to familiarize oneself with the contents of a (writing) prior to its execution is traceable . . . to carelessness or negligence . . . where such failure . . . is induced . . . by the false representations and fraud of the other party, the court, even in the absence of a fiduciary relationship should reform . . . the instrument . . ." *Witkin's Summary of California Law,* Vol. 1, p. 151.

D. The Alleged Recognition Agreement Is Not Binding Upon Respondent Because Respondent's Employee Meyers Did Not Have the Authority to Enter Into Said Agreement.

Meyers did not have the actual authority to negotiate or execute any agreement whatsoever [Tr. 361, lines 3-6; Tr. 348, lines 11 *et seq.*]. Mr. Meyers told the Union representative that he had no authority [Tr. 250, lines 25 *et seq.*].

Assuming *arguendo* that Meyers signed the document knowing what he was signing—the document still cannot be binding on the Respondent since Meyers did not have the authority to sign it and since the applicable rule of Agency is as follows:

> "No liability is incurred by the principal for acts of the agent beyond the scope of his actual or ostensible authority, *and a third party who deals with an agent and knows of the agency is under a duty to ascertain the scope.* Hence, if the agent acts beyond his actual authority and the conduct of the principal has not been such as to give him ostensible authority, the principal cannot be held." (Emphasis added).
>
> *Witkin's Summary of California Law,* Vol. 1, p. 417.

Mr. Schwartz (Union Agent), who testified that he met with Mr. Dunn in Philadelphia on June 27, 1965, testified that on such date he said to Mr. Dunn, "I was informed by the Union in Los Angeles that the plant manager does not have authority to negotiate the agreement." [Tr. 179, lines 16-18]. We, therefore, see that on June 27, the Union knew that Meyers did not have authority in this matter.

The testimony of Mr. Schwartz [Tr. 172, lines 24-25] indicates that Mr. Schwartz knew on July 6th that Meyers had no authority to sign a document. The record is replete with testimony of all of the parties who testified in this matter that they knew that Meyers called Dunn constantly and that Dunn made all the decisions. We know that there was no actual agency and from a review of the facts, it becomes clear that there was no ostensible agency.

The Trial Examiner found [R. 25, lines 49-52] that Meyers had ostensible authority to receive the Union's request for recognition and to act thereon, citing (*James Thompson & Company, Inc.,* 100 N.L.R.B. 456, 462 enforced in part 208 F. 2d 743 (C.A. 2); (*Rural Electric Company, Inc.,* 130 N.L.R.B. 799, 801-802 enforced in part 296 F. 2d 523 (C.A. 10). In neither of these cases are the words "ostensible agency" used. In both cases the Union called the company's manager and asked him to recognize the Union. In both cases, the manager refused. It seems that what the Trial Examiner and the Board have done is find that since two managers in two different cases had ostensible authority to indicate an unwillingness to negotiate, that all managers in all cases have ostensible authority to recognize a union. The difference between an indication of unwillingness to negotiate and the recognition of a union is great. The facts of each individual case must be carefully scrutinized. The instant situation is one in which the manager had no authority, ostensible or otherwise, to deal with the union in any way whatsoever.

V.

Respondent Did Not Negotiate With the Union—Discussions With the Union Were Information Seeking Not Negotiating.

The Trial Examiner found that the Company negotiated with the Union. The Board adopted that finding. In one breath, the General Counsel alleges a violation for failing to negotiate and bargain and in another breath, it is argued that the Company did negotiate. It is clear that the Company did not negotiate but was merely seeking to obtain information expecting an election.

Dunn and Meyers believed that the only way a union could be recognized was by a secret election [Tr. 37, lines 23 *et seq.*] and it was expected that a petition for such an election would be forthcoming soon. Dunn testified:

> "Q. Now, did you ever receive from the union a form contract such as General Counsel's Exhibit 5? A. Yes, I did.
>
> Q. Did you read it carefully? A. I read it very carefully.
>
> Q. Why did you read it carefully?
>
> The Witness: I read it very carefully, because after receiving it, I felt that there would be a petition for an election, and I thought it in my best interest to read it carefully to know what type of position I should take when that time arose." [R. Tr. p. 357, lines 11-16 and 20-23].
>
> "However, I was interested in getting information inasmuch as at this point I was fairly certain that there would be a petition for an election." [Tr. 360, lines 17-19].

Dunn's entire testimony is replete with references to the election which he believed was indispensable and inevitable.

Conclusion.

In conclusion the Petitioner respectfully submits that by reason of the matters set forth herein the Findings, Conclusions, Decisions and Order of the National Labor Relations Board should be set aside, vacated and annulled.

FINK, WARSHAW & BENJAMIN,
By HAROLD H. BENJAMIN,
Attorneys for Mutual Industries, Respondent.

Certificate.

I certify, that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD H. BENJAMIN,
Attorney for Respondent.

EXHIBIT A.

Employees Prior to April 12, 1965.

EMPLOYEE	No. 1 Did not testify as to medical insurance	No. 2 Testified that no one ever discussed medical insurance with him	No. 3 Testified that he was told employer would pay for medical insurance	No. Test he v emp pay
BOCAGE	X			
M. ELIAS (Tr. 246)				
LARA	X			
KARDASCHIAN	X			
E. ELIAS	X			
JANA	X			
USTICA (Tr. 232)				
MARINEZ	X			
	EMPLOYEES SUBSEQUENT TO APRIL 12,			
ESTRADA (Tr. 74)				
JASSO (Tr. 232) (Tr. 246)			X	
FAIRFIELD (Tr. 246)				
GUERRERO (Tr. 241, lines 21)		X		